NO. 85-799

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DALE A. MONROE,

Petitioner

versus

U. S. DEPARTMENT OF TREASURY,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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The respondent argues that the agency (Bureau of ATF, Department of Treasury) procedure in this case, which allowed the agency official who heard the employee's oral response to neither make a decision nor make a recommendation to the official who did make the decision, was proper for two reasons:

First, respondent now contends that the statute and regulation [5 U. S. C. 7513, 5 C. F. R. 752.404 (c) (2)] which

acknowledge and provide government employees the due process protection of replying orally to a deciding official, or one who can make a recommendation --- are fully satisfied if the official does neither. Thus, according to the respondent, procedural requirements detailed by the Congress and prescribed by the Office of Personnel Management (OPM) need not be followed unless the written rule is followed by this sentence: "This procedure must be followed in letter and in spirit."

The need for procedural due process protection for citizens has long been recognized and described by Congress, boards and courts. In 1977-78 the Congress was aware that federal employees must be given procedural, as well as sustantive, due process protection, and it expanded the Civil Service Reform Act by creating an Office of Special Counsel, within the MSPB, to represent employees against prohibited personnel practices. And the Congress also retained the right for an employee to give an oral, face-to-face presentation to someone in authority in the agency.

The compelling need for these protections was apparent in 1977 and has been amply demonstrated since then; U. S. Air Force and Defense Department employees have been demoted, transferred or fired by merely pointing out that it is improper to pay $632 for a plastic toilet seat and a host of other examples similar to that one. The Congress and the OPM felt that all employees should have the right to demonstrate their credibility by orally responding to a responsible official in the agency --- one who would have some influence over the final disciplinary decision --- either make the decision or recommend one. The petitioner special agent had 22 years of honorable experience in law enforcement (twelve with this agency) and he would qualify under any guideline for consideration.

The official appointed to hear the oral reply in this case was not the "wrong person" from the standpoint of qualifications;

he was qualified but he simply did not follow through on his responsibility for personal or other reasons.

The second reason urged by the respondent is that the petitioner did not give a "credible statement" of how the procedural error harmed him. The petitioner used several pages of testimony transcript to do this, but one cannot know what the agency considers "credible" or not. The agency official who heard the oral reply may have recommended favorable treatment for the petitioner because he told him that he was more concerned with whether the agent had previously met the informant (Administrative Record Tab 5). Abundant evidence existed, and more was developed later, that the special agent had previously worked with the informant; however, the actual "decision agency official" ignored this evidence and the charge remained until it was removed by the MSPB Presiding Official. The official who heard the oral reply did not perform his function as described by the Court of Claims: "... further, he has a right to expect that the 'oral reply officer' will be the one whose recommendation would be meaningful, not an empty formality." *Ricucci v. United States*, 425 F. 2nd 1252 at pg. 1255 (1970).

The Solicitor General now maintains that the "oral reply officer" is not required to do anything --- and that could be one's impression of the Federal Circuit decision in this case; however, the court also maintains that procedural rules need not be followed unless the person affected can show that the rules would have been beneficial. Those are the questions concerning procedure that are now before the Supreme Court.

With regard to petitioner's argument of improper ex parte private meeting of petitioner's witness, agency official, and attorney the night before the hearing, respondent argues that this is necessary as part of the fact-finding process --- apparently forgetting that the "fact-finding" or investigation phase of the case ended a few weeks prior to that.

The matter was now in the "court" or hearing phase and

the meeting changed a witness who had conscientiously supported the petitioner because he worked with him into one who did not. The Deputy Director had full authority to transfer, demote, promote, or assign the witness and he knew that. The employee's change the next day startled the petitioner and his attorney and the reason for the change was accidentally discovered upon cross examination.

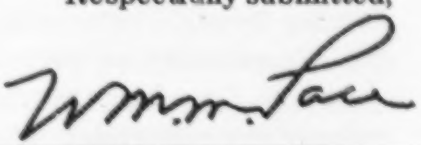
Petitioner's implication that the "cross examination" procedure would clear up any harm done does not consider human nature or how the Federal investigative agencies are sometimes operated. An employee's fear of reprisal from management is often stronger than his inherent desire for truth, especially on such short notice. If he admitted that in an open hearing he would likely get the reprisal.

Petitioner knows of no statutory or regulatory rule that addresses this procedure because secret meetings under these circumstances is obviously unfair and discourteous; therefore, it need not be prohibited explicitly by statute.

The administrative and judicial decisions below (Agency, MSPB and Federal Circuit) in this case amount to broad declarations that procedural safeguards do not have to be followed except in cases where the employee meets the burden of proof to prove that the procedures may have been beneficial to him; and that government managers may require adverse employee witnesses to submit to private questioning during the MSPB hearing.

These questions are important and deserve review by the Supreme Court.

Respectfully submitted,

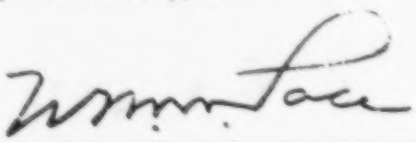


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CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above Reply Brief for Petitioner upon the Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20520, and three copies upon the General Counsel, Department of Treasury, 15th Street and Pennsylvania Ave., N. W., Washington, D. C. 20220, by first class mail.

This the 27th day of February, 1986.



WILLIAM M. PACE